(6)

No. 95-853

In The

Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner,

v.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Mississippi

BRIEF FOR RESPONDENTS

Mike Moore
Attorney General
State of Mississippi

Rickey T. Moore*
Special Assistant
Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

Counsel for Respondents

*Counsel of Record

June 28, 1996

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46 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Mississippi impinges a fundamental right when it requires all civil appellants to prepay appeal costs?

2. Does the Fourteenth Amendment require the State of Mississippi to subsidize an indigent for the cost of appeal from a trial court decision terminating parental rights?

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STATEMENT

Petitioner M.L.B. and respondent S.L.J. were divorced on June 9, 1992 with respondent being granted the paramount physical and legal custody of their minor children, ages 7 and 9. At the time of the divorce, petitioner was living with a convicted felon who drank heavily and could be violent. While the final decree of divorce allowed petitioner reasonable and liberal visitation rights with the minor children, it also specifically provided that "in no event and under no circumstances shall the wife exercise her visitation with said minor children in the presence of" the convicted felon. Additionally, petitioner was ordered to pay $40.00 a week child support beginning May 1, 1992, to maintain medical insurance on the children, and to pay half of all medical bills not covered by the insurance policy.

Some 17 months later, on November 15, 1993, S.L.J. and his new wife J.P.J. filed a complaint for adoption in the Chancery Court of Benton County, Mississippi seeking to terminate the parental rights of petitioner M.L.B. and to allow J.P.J. to adopt the minor children. The complaint alleged that the petitioner had abandoned and deserted the children; was mentally and physically unfit to train and rear the children; had refused to offer any means of support for the children since the divorce; and had failed to exercise any reasonable visitation rights, even though they were available to her.

The chancery judge, after hearing testimony and evidence on August 18, November 2, and December 12, 1994, ruled that the adoption should be granted. The judge

found that under §§ 93-17-7 and 93-15-103 of the Mississippi Code of 1972 it had been established by clear and convincing evidence that there existed a substantial erosion of the relationship between the natural mother and the minor children which had been caused, at least in part, by petitioner's "serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with the minor children." Pet. App. 8.

Petitioner M.L.B. filed a notice of appeal to the Supreme Court of Mississippi on January 11, 1995. Pet. App. 13. The clerk of the chancery court then estimated the cost of preparing and transmitting the record to be $2,352.36, which included $1,900 for the transcript, $438 for the other papers in the record, $4.36 for binders, and $10.00 for mailing.

Miss. Code Ann. § 11-51-3 (1972) allows for appeal of civil cases, subject to prerequisites such as the requirement of timely notice under Rule 4 of the Mississippi Rules of Appellate Procedure, prepayment of costs pursuant to Miss. Code Ann. § 11-51-29 (1972) and Rule 11(b)(1), M.R.A.P., and, in some cases, posting of bond pursuant to Miss. Code Ann. § 11-51-31 (1972). The per page costs of the transcript and the papers from the record are set by statute. Miss. Code Ann. §§ 25-7-1, 25-7-13(6) (1972). The notice of appeal is filed with the Supreme Court of Mississippi, which thereafter determines whether to retain the case or send it to the intermediate Mississippi Court of Appeals for decision. Rule 16, M.R.A.P. A decision of the Court of Appeals is a final decision unless the Supreme Court of Mississippi grants review pursuant to a writ of certiorari. Rule 17, M.R.A.P.

Rule 10(b)(2), M.R.A.P., requires that a transcript be prepared if the appellant "intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence." The transcript is prepared by the court reporter who is paid two dollars ($2.00) per page. Miss. Code Ann. § 25-7-89 (1972).

On July 10, 1995, the Supreme Court of Mississippi issued an order requiring the petitioner, within fourteen days, to correct certain deficiencies or face dismissal of her appeal. Pet. App. 4. On July 24, 1995, petitioner filed a motion for leave to appeal *in forma pauperis* in the Chancery Court of Benton County, Mississippi. Pet. App. 17. Thereafter, on July 27, 1995, petitioner filed in the Supreme Court of Mississippi a motion to suspend rules, for leave to appeal *in forma pauperis*, and to brief the issue of *in forma pauperis* appeals.

On August 18, 1995, the Supreme Court of Mississippi issued an order denying the motion to suspend rules, for leave to appeal *in forma pauperis*, and to brief the issue of *in forma pauperis* appeals. The decision was based on prior cases which had concluded that the right to proceed *in forma pauperis* in civil cases exists only at the trial level. An order of final dismissal was entered on August 31, 1995. Pet. App. 1-2. The petitioner then filed her petition for writ of certiorari and on April 1, 1996, this Court granted the writ.

SUMMARY OF THE ARGUMENT

As a matter of Due Process and Equal Protection under the Fourteenth Amendment, the right to free transcripts on appeal for indigents exists only in criminal cases and arguably only in those situations where the indigent's personal physical freedom is at issue. Thus, the holding of the Supreme Court of Mississippi that all persons, regardless of their claim, must prepay civil appeal costs is correct. Those rights that exist in criminal appeals should not be extended to civil appeals, as suggested by petitioner, because such an extension would mark a sharp break from the past, creating a new and expansive constitutional right that is not supported by principle and which would result in potentially huge additional expenses being heaped upon the states.

At issue in this case is a rule of general applicability designed to reimburse the State of Mississippi for the actual costs of a service it provides. The requirement that all civil appellants prepay appeal costs is a reasonable requirement which does not directly or significantly interfere with the parent/child relationship. This requirement is rationally related to the legitimate State interests of both helping to offset the cost of the court system, recognized as legitimate in *Ortwein v. Schwab*, 410 U.S. 656 (1973), and in avoiding the potentially large additional expenses that the State would bear if it is forced to subsidize the costs of civil appeals by indigents. Moreover, this Court has never held that a state must pay the costs of an appeal in a civil case.

1. The hearing provided to the indigent in this case fulfilled the requirements of civil due process because it was "fundamentally fair." *Ortwein v. Schwab*, 410 U.S. 656 (1973); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); and *Santosky v. Kramer*, 455 U.S. 745 (1982). Mississippi law provides extensive safeguards, including a high standard of proof, to assure accurate decisions at the trial court level. Prior to termination of her parental rights, petitioner, with the assistance of counsel, was accorded a full evidentiary hearing on the merits in front of a judge trained in the law. She was allowed to testify, to call witnesses on her behalf and to cross-examine adverse witnesses. Her parental rights were terminated only after the hearing and a finding by the chancery judge that there was clear and convincing evidence that the statutory requirements for termination had been shown. These procedures resulted in a hearing which was fundamentally fair and which had a low risk of error. The Constitution has never been construed to require states to provide procedures after a fair trial has been held.

Petitioner in this case seeks a large subsidy. Since the court reporter is paid two dollars ($2.00) per page for preparation of the transcript, subsidizing indigent appellants would require appropriation and expenditure of additional funds. However, prior decisions of this Court hold that such is not required because failure to subsidize the exercise of a fundamental right "does not infringe the right." *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989); *Lyng v. International Union, et al.*, 485 U.S. 360, 368 (1988); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983); and *Harris*

v. McRae, 448 U.S. 297, 316-18 (1980). The decision to subsidize an indigent seeking to appeal an order terminating parental rights is not a matter of constitutional law but is a matter of public policy best left to the discretion of the State legislature. *See, e.g., Helvering v. Davis*, 301 U.S. 619 (1937).

Petitioner's attempt to equate termination of parental rights to loss of physical liberty for Fourteenth Amendment purposes is not supported by history or reason. Prior decisions of this Court establish that the right to appointed counsel and free transcripts for appellate review depend upon the loss of absolute personal freedom and/or stigma associated with criminal conviction, not merely upon deprivation of some liberty or other interest. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). These rights have never been extended beyond that, nor should they be, since both loss of personal freedom and stigma associated with criminal conviction are unlike any other form of deprivation.

Even if *Mathews v. Eldridge*, 424 U.S. 319 (1976) applied – which it does not – the test established therein would be met. Petitioner's interests are far less than in criminal cases and are diminished still further by her being a non-custodial parent. Further, the chance of an erroneous decision by the trial court is minimized by full trial procedural safeguards and a heavy burden of proof. Moreover, the burden on the State of providing such a subsidy would be significant. Once the barrier between criminal and civil cases has been torn down it can only be assumed that the State will be forced to bear the costs of all appeals of indigents wherein "fundamental rights" are allegedly involved. Such appeals arguably would include

all domestic relations matters such as divorce, paternity and child custody and arguably might include all civil appeals. A Pandora's box, without principled basis for distinction, will be opened. In 1995, there were 86,241 civil actions filed in the Chancery and Circuit Courts of the State of Mississippi. Of those, 39,475 were domestic relations cases. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 48, 55.

2. The Equal Protection Clause does not proscribe a state statute of general applicability, even if it has a greater impact on a non-suspect class. *Washington v. Davis*, 426 U.S. 229, 242 (1976). This Court has specifically held that the poor are not a suspect class. *Harris v. McRae*, 448 U.S. 297, 323 (1980). The statute in this case does not distinguish between groups of persons nor does it classify directly on the basis of termination of parental rights. Everyone must prepay appeal cost regardless of the right or claim involved in the appeal. Indigents seeking to appeal termination of parental rights are not affected any more than indigents seeking to appeal other adverse judgments. Moreover, petitioner does not allege that this statute was designed for any reason other than the legitimate legislative goal of covering the costs of providing a discretionary service, the civil appellate system. The result in this case should therefore be the same as in *Schweiker v. Wilson*, 450 U.S. 221 (1981), wherein this Court rejected an equal protection challenge to similar legislation.

ARGUMENT

At issue in this case is a rule of general applicability which requires that appellants pay the actual costs of services provided to them. The State is not constitutionally required to provide appeals. Having chosen to do so, it reasonably concluded that those persons seeking to take advantage of that service – appellants – should pay associated costs such as the transcription of the record. The State's objective is reasonable and its means of accomplishing it constitutional.

Petitioner's focus on the purported "fundamental" right at stake misses the point. The Constitution does not require a state to subsidize the costs of exercising even fundamental rights. Where a statute does not specifically target a particular right or economic class, this Court's precedents require only rational laws and an opportunity to be heard when a fundamental civil right may be lost – not an ironclad opportunity to appeal. The broad new right to subsidized civil appeals proposed by petitioner should be rejected.[1]

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[1] Petitioner's reliance on the notion that the State could not pass a law limiting appeals to people whose income exceeds a certain amount (Pet. Br. 8, 12) is flawed. Such a law would plainly be arbitrary and irrational. By contrast, the requirement at issue is reasonably related to Mississippi's recovery of the costs of litigation instituted by an appellant. Moreover, under petitioner's reasoning, any requirement of a fee or payment of the costs of appeal would be unconstitutional, regardless of the nature of the interests at issue.

I. THE DUE PROCESS CLAUSE IS NOT VIOLATED BY MISSISSIPPI'S FAILURE TO SUBSIDIZE THE COSTS OF AN APPEAL FROM A DECISION OF A LOWER COURT TERMINATING PARENTAL RIGHTS

Petitioner, in her termination of parental rights hearing in the Chancery Court of Benton County, Mississippi, was represented by counsel and was accorded a full evidentiary hearing on the merits in front of a judge trained in the law. This process accorded her an opportunity to be heard which was fundamentally fair. She was thus provided all due process to which she was entitled since prior case law establishes that there is no constitutional right to an appeal. *See District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (holding that "[d]ue process does not comprehend the right of appeal . . . "); and *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) (stating that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."). Although this Court has carved out an exception that states must permit *in forma pauperis* appeals in criminal cases, that exception has not been extended to civil cases. Such an extension should be rejected because it would mark a sharp break from the past, creating a new and expansive constitutional right to a state subsidy that is not supported by principle and which would result in potentially huge additional expenses being heaped upon the states.

A. Petitioner Received Fair and Full Process

1. There is no dispute that the trial below was fair

Petitioner does not allege that she was denied a meaningful opportunity to be heard nor does she allege that the process was not "fundamentally fair." Further, she does not allege that the chancery judge applied the wrong standard of law or that he was other than an unbiased decision maker. Instead, she urges that the Fourteenth Amendment requires that she be accorded an appeal, at taxpayer expense, to challenge the factual findings of the chancery judge – something that no other civil litigant in Mississippi is granted.

At her termination of parental rights hearing, petitioner was represented by counsel and was accorded a full hearing on the merits in front of a judge trained in the law. She was allowed to testify, to call witnesses on her behalf and to cross-examine adverse witnesses. The chancery judge, after hearing testimony and evidence on August 18, November 2, and December 12, 1994, ruled that the adoption should be granted. The judge found that under §§ 93-17-7 and 93-15-103 of the Mississippi Code of 1972 it had been established by clear and convincing evidence that there existed a substantial erosion of the relationship between the natural mother and the minor children which had been caused, at least in part, by petitioner's "serious neglect, abuse, prolonged and

unreasonable absence or unreasonable failure to visit or communicate with the minor children."[2] Pet. App. 8.

This case arose out of a fundamentally fair proceeding. The Due Process Clause of the Fourteenth Amendment requires no more than was accorded to petitioner in this case.

2. The Constitution does not require any procedures beyond the trial court level

The Due Process Clause does not require that states permit appeals of trial court decisions – regardless of how powerful the litigants purported interest is. *See District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937). A state permits an appeal at its discretion. Accordingly, the balancing of interest procedure established in *Mathews v. Eldridge*, 424 U.S. 319 (1976) has never been held to apply beyond the trial court level. The question presented in *Mathews* was *when and in what manner* a hearing would be provided prior to termination of Social Security disability payments. *Id.* at 332-34. The cases relied on by the majority involved challenges to due process procedures in either administrative[3] or *ex parte* quasi-judicial actions[4] negatively affecting rights of individuals prior to notice

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[2] Statutory grounds for termination of parental rights are contained in Miss. Code § 93-15-103, which is reproduced in Appendix "A" of this Brief.

[3] *See, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[4] *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

and opportunity to be heard. The balancing of the individual interest against that of the government in *Mathews* was required to ensure that the individual was not erroneously deprived of benefits. Implicit in this reasoning is that the government had the advantage of being able to regulate benefits in its own interest through its own devices. Under these circumstances, "fundamental fairness" required that the individual be given an opportunity to be heard.[5]

B. In Civil Cases, The Due Process Clause Does Not Require A State To Subsidize Costs of People Pursuing Even Fundamental Interests

The State of Mississippi is being asked here to subsidize the costs of indigents appealing their cases. The petitioner in this case does not seek simply to get a waiver of a filing fee as in *Ortwein v. Schwab*, 410 U.S. 656 (1973), but instead seeks to have the State pay the cost of having the record prepared, including preparation of the transcript by the court reporter.[6] However, case law is clear that a state need not provide funds so that people can exercise even fundamental rights. *See, e.g., Lyng v. International Union, et al.*, 485 U.S. 360, 368 (1988) (holding

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[5] Contrary to petitioner's assertions, the necessity of appellate review was not an issue in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). That case established only that "fundamental fairness" under due process does not require that an indigent in a termination of parental rights case have assistance of an attorney in the trial court.

[6] Access to the appellate court would require the State to both waive the filing fee and to subsidize the petitioner in the amount of over $2300 for preparation of the record on appeal.

that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983), which rejected the argument that the exercise of constitutional rights includes an affirmative government funding obligation. Relying on the long-held view that the Constitution is a negative document, this Court held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. *See also DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980) (Medicaid need not fund abortions even though abortion is a constitutionally protected alternative).

The statute at issue applies to all civil appeals and all parties – it does not penalize the exercise of particular rights or penalize petitioner while subsidizing others. *Compare Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (holding that state tax exemption statute, which effectively eliminated the tax burden of smaller newspapers, "begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises"); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that state unemployment compensation statute, by denying benefits to those unemployed for religious, rather than

economic reasons, "effectively penalizes the free exercise of . . . constitutional liberties.").

The decision to subsidize an indigent seeking to appeal an order terminating parental rights is not a matter of constitutional right but is a matter of public policy best left to the discretion of the state legislature. *See, e.g., Helvering v. Davis*, 301 U.S. 619 (1937), in which Justice Cardozo commented that "The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* at 640.

C. Interpreting The Due Process Clause To Require States To Subsidize Civil Appeals Would Mark An Unjustified Creation Of A New Constitutional Right

1. This Court has never held that a state must subsidize the costs of an appeal in a civil case

Petitioner does not allege that she was denied a meaningful opportunity to be heard nor does she allege that the process was not "fundamentally fair." Instead, she urges that the Fourteenth Amendment requires that she be accorded an appeal, at taxpayer expense, to challenge the factual findings of the chancery judge. No case of this Court or principle of constitutional law establishes that petitioner is entitled to be subsidized or preferred to other civil litigants for purposes of appeal.

The decision below of the Supreme Court of Mississippi holds that the right to proceed *in forma pauperis* in

civil cases exists only at the trial level.[7] This ruling is in conformity with the decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973), the only case in which this Court has addressed the right of an indigent to an appeal in a civil case. In *Ortwein*, this Court held that Oregon's $25 appellate court filing fee (1) was not a denial of due process, because the petitioners received agency pre-termination evidentiary hearings meeting due process requirements; (2) did not violate the Equal Protection Clause, as unconstitutionally discriminating against the poor, because the fee was rationally justified to meet court expenses; and (3) did not violate the Equal Protection Clause as arbitrary and capricious in allowing others to appeal *in forma pauperis*. This Court specifically rejected appellants reliance on *Boddie v. Connecticut*, 401 U.S. 371 (1971), noting that *Boddie* "was not concerned with post-hearing review." *Ortwein*, 410 U.S. at 659.

Boddie held that indigents seeking a divorce must be allowed access to the trial court without payment of filing fees. The decision was based primarily on the principle that due process requires that those persons who are forced into the judicial process must be given a meaningful opportunity to be heard. *Id.* at 377. It is indisputable that petitioner in this case received a meaningful opportunity to be heard and, indeed, that the trial was "fundamentally fair." Petitioner cannot state a claim under *Boddie*.

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[7] *See also Moreno v. State*, 637 So.2d 200 (Miss. 1994), *Nelson v. Bank of Mississippi*, 498 So.2d 365 (Miss. 1986), and *Life and Casualty Ins. Co. v. Walters*, 190 Miss. 761, 772-74, 200 So. 732 (1941).

The decision in *Boddie* represents the outer limits of indigent court access rights in civil law. Subsequent cases confirm that petitioner is attempting to create new rights that extend far beyond prior case law. *See Ortwein*, 410 U.S. at 659-660 (holding that an administrative hearing is an adequate alternative to court access when a fundamental right is not impinged); *United States v. Kras*, 409 U.S. 434 (1973) (rejecting a challenge to a filing fee by an indigent debtor who sought access to bankruptcy court); and *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that refusal to appoint counsel for indigent parent in parental status termination proceeding does not violate the Due Process Clause of the Fourteenth Amendment). These decisions confirm the limitation of the decision in *Boddie*.

Contrary to petitioner's allegations, the decision in *Lindsey v. Normet*, 405 U.S. 56 (1972) does not support the conclusion that "the relevant principles from *Griffin* encompass not only civil cases at the trial court level, but also those on appeal." Pet. Br. 15. *Lindsey* addressed a statute that imposed a requirement of posting a double bond only on tenants evicted under a forcible entry and wrongful detainer statute. The Court invalidated this requirement on traditional equal protection grounds because it arbitrarily and irrationally distinguished between classes or types of appellants. *Lindsey*, 405 U.S. at 79. No such distinction exists in the present case which involves a statute applicable to all civil cases and parties. Moreover, petitioner's conclusion is further contradicted by the fact that *Lindsey* reaffirmed that the Due Process Clause does not require a State to provide appellate review if a full and fair hearing on the merits has been

provided. *Id.* at 77. Finally, if the decision in *Lindsey* had made it clear that the principles of *Griffin* and its progeny apply to civil cases, then *Lassiter* would have been decided differently.

The Circuit Courts of Appeal which have addressed the issue of prepayment of appeal costs have rejected the arguments raised by petitioner herein. The Fifth Circuit Court of Appeals in *Nickens v. Melton*, 38 F.3d 183 (CA5 1994), relying on this Court's decisions in *Ortwein*, *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (holding that "[d]ue process does not comprehend the right of appeal."); and *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930) (stating that "the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."), held that Miss. Code Ann. § 11-53-17 (1993) allows a petitioner to proceed *in forma pauperis* at the trial court level and therefore provides adequate post-deprivation remedies to satisfy due process. *Id.* at 185; *See also Edward B. v. Paul*, 814 F.2d 52 (CA1 1987); *Hill v. State of Michigan*, 488 F.2d 609 (CA6 1973), *cert. denied*, 416 U.S. 973 (1974); *Piatt v. MacDougall*, 773 F.2d 1032 (CA9 1985); *Otasco, Inc. v. United States*, 689 F.2d 162 (CA10 1982), *cert. denied*, 460 U.S. 1069 (1983).

2. There Are Sound, Indeed Compelling, Reasons To Distinguish Criminal Appeals From Civil Appeals

Petitioner's attempt to equate termination of parental rights to loss of physical liberty for Fourteenth Amendment purposes is not supported by history or reason. The

interest involved in the criminal context is in stark contrast to the personal interest involved and the historical background of the parent-child relationship. The decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) implicitly recognized this distinction.[8] This Court's holding in *Griffin v. Illinois*, 351 U.S. 12 (1956), that the Fourteenth Amendment requires free transcripts for appellate review of criminal convictions, should therefore not be extended to civil cases.

The due process and equal protection decisions in the criminal context are premised on the concept that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin*, 351 U.S. at 17. Criminal punishment implicates both the universal, ancient and fundamental high regard for the protection of physical liberty and a stigma unlike any other. Such punishment is categorically and fundamentally different from the personal interest involved and the historical background of the parent-child relationship. Prior decisions of this Court establish that the right to appointed counsel and free transcripts

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[8] It is noted that in Colonial America the parent was considered an agent of the community given the job of raising desirable and productive citizens. Widely varied laws were passed by different communities to ensure that the parents performed their obligations. If the parents failed in their obligations, the child was removed from the home. The parent-child relationship was not mentioned in the Constitution because the diversity of values on the issue could not be encompassed in one simple formula. See Giovannoni & Becerra, *Defining Child Abuse* (1979), pp. 31-75, for an extensive discussion of the legal relationship between parents, their children, and the state.

for appellate review depend upon the loss of absolute personal freedom and/or stigma associated with criminal conviction, not merely upon deprivation of some liberty or other interest. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). These rights have never been extended beyond that, nor should they be, since both loss of personal freedom and stigma associated with criminal conviction are unlike any other form of deprivation. Further, abuse of the criminal process can quickly subjugate civil liberties.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court acknowledged that the magnitude of the interest involved, and by implication the need for counsel and appellate process, is greater in a criminal case than in civil matters:

> When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."

Id. at 755, quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979). For this reason, criminal defendants also receive a panoply of procedural protections to which no civil litigant is entitled.

The difference between the interest involved in criminal and civil actions is illustrated by the right to counsel cases. The decision in *Powell v. Alabama*, 287 U.S. 45 (1932) established the constitutional rule that indigent criminal defendants have a right to appointed counsel. The right

to appointed counsel becomes less absolute when no criminal prosecution is involved. Thus, there is no absolute right to counsel at parole and probation revocations even when personal freedom is at stake. *See, e.g., Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (holding that an absolute right to appointed counsel does not exist when something less than the defendant's "absolute liberty" is at risk); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (holding that defendant had already lost his "absolute liberty" by virtue of his conviction and that what remained was "conditional liberty").

The decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) confirms that civil cases require far fewer procedural safeguards than criminal cases. This Court in *Lassiter* considered and rejected the contention that termination of parental rights cases should be treated like criminal cases for due process purposes. Plaintiff, an indigent, argued that she had been denied Fourteenth Amendment Due Process when the State failed to provide counsel in her termination of parental rights case. This Court pursued a two-step inquiry. First, it held that prior criminal and civil due process decisions establish a presumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. This presumption was derived from *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), in which this Court declined to grant indigent probationers an absolute right to counsel at probation revocation proceedings, and from *Scott v. Illinois*, 440 U.S. 367 (1979), in which this Court refused to require counsel for an indigent criminal defendant whose conviction did not result in imprisonment. This presumption was balanced against

the *Mathews* factors of state interest, private interest, and risk of error in existing procedures. *Lassiter*, 452 U.S. at 27. The majority concluded that a parent's interest in the custody and care of his or her child is a compelling one, the termination of which "work[s] a unique kind of deprivation." *Id.* at 27. However, it was concluded that the absence of counsel did not render the hearing "fundamentally unfair" and did not deprive Lassiter of due process. *Id.* at 33.

The decision in *Lassiter* establishes that: (1) the magnitude of personal interests in a criminal case is much greater than in a termination of parental rights case; and (2) there are separate due process requirements for criminal and civil litigants.

Petitioner's contention that the right of access to appellate courts in the criminal context is far broader than any right to counsel, is not supported by law or reason. The vast majority of cases, both criminal and civil, are won or lost at the trial court level. Certainly, petitioner's reliance on the decision in *Ross v. Moffit*, 417 U.S. 600 (1974), as support for this conclusion, is misplaced. The question raised there was whether the State had to furnish counsel for a second and subsequent appeals. *Id.* at 602-03. This Court concluded that not furnishing counsel for such review, unlike not furnishing counsel for initial appeals, did not operate to deny meaningful access to appellate review. Additionally, access did not include the cost of a transcript. *Id.* at 615. The decision in *Ross* provides no support for petitioner's suggestion that right to an appellate transcript is broader than right to assistance of counsel at the trial court level or on the first

appeal.[9] At most, *Ross* arguably stands for the conclusion that right to waiver of an appellate filing fee is broader or more important than assistance of counsel in second and subsequent appeals.

Cases such as *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) and *Ortwein v. Schwab*, 410 U.S. 656 (1973) establish that the right to free transcripts for appellate review depend upon the loss of absolute personal freedom and/or stigma associated with criminal punishment, not merely upon deprivation of some liberty or other interest. These cases also support the conclusion that the decision in *Mayer v. Chicago*, 404 U.S. 189 (1971), relied upon by petitioner herein, simply does not apply in a civil case. This Court distinguished *Mayer* from a civil case by acknowledging that the practical effect of conviction of even a petty offense could be as detrimental to the accused as forced confinement. 404 U.S. at 197. *Mayer* is also distinguished by the fact that there is a much greater likelihood of error in the trial of even a petty criminal offense under the *Mathews* formula because of complicated evidentiary and procedural rules.

3. Even assuming arguendo that *Mathews* were applicable to the appeals context, its requirement of "fundamental fairness" is met in this case

Even if *Mathews v. Eldridge*, 424 U.S. 319 (1976) were applicable to an appeal, which it is not [*see supra* at

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[9] This is true also of the decision in *Long v. District Court of Iowa*, 385 U.S. 192 (1966), which combined the issues of physical liberty and an easily available transcript. *Id.* at 194-95.

§I(A)(2)], the process provided to the indigent in this case met its requirement of "fundamental fairness." Determining "fundamental fairness" in a particular situation requires a two-step analysis. *Lassiter*, 452 U.S. at 24-25. First, a court must determine whether the challenged state action implicates a protected property or liberty interest. *Board of Regents v. Roth*, 408 U.S. 564, 569-72 (1972). Then, if such a protected interest is involved, the court must determine what process is due before an individual may be deprived of that interest. The second determination may be made by applying the test established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

This process requires that the fairness and reliability of the existing procedures be considered before a determination can be made that the Constitution requires more. *Mathews*, 424 U.S. at 343. This broad inquiry is necessary for determination of whether the procedure used satisfies the "fundamental fairness" requirement of due process. *Santosky*, 455 U.S. 745, 775 (1982).

An analysis of the test explicated in *Mathews* shows that the process accorded petitioner in this case was

"fundamentally fair" and constituted all process which she was entitled to under the Constitution.

a. Petitioner's interests are significantly less than in a criminal case

Respondents incorporate their discussion contained in §I(C)(2) of this brief in support of this argument. That discussion shows that petitioner's attempt to equate termination of parental rights to loss of physical liberty for Fourteenth Amendment purposes is not supported by history or reason. Moreover, petitioner's interest in the care, custody and control of her children in this case became qualified or conditional when she lost custody, as a result of her actions, in the original divorce proceeding. Her subsequent failure to show any meaningful concern for their welfare caused that relationship to devolve into a purely biological relationship devoid of any meaningful association. Petitioner does not allege that she is a good parent. Instead, she alleges that the evidence was not clear and convincing enough to establish that she is such a bad parent that her parental rights should be terminated. When that interest is balanced against the interests of the children it becomes something less than fundamental and requires less constitutional protection. *See Quillion v. Walcott*, 434 U.S. 246, 255 (1978), wherein this Court held that neither the consent of nor a showing of unfitness of the natural father was necessary for adoption in a situation where the father had not raised or legitimated

his children. *Quillion* establishes that substantive family rights depend, in part, on parental conduct.[10]

b. Risk of erroneous deprivation in a termination of parental rights case is small

The risk that parents will be erroneously deprived of their parental rights because of lack of appellate review is low in these cases. Mississippi law provides extensive safeguards to assure accurate decisions at the trial court level: A petition for termination of parental rights may be filed only in the county in which a defendant or the child resides, or in the county where an agency or institution holding custody of the child is located. Miss. Code § 93-15-105(1). The mother of the child, the legal father of the child, and the putative father of the child, when known, must be made parties defendant. A guardian ad litem must be appointed to represent the interest of the child. Miss. Code § 93-15-107. The petition is not triable by the chancery court until 30 days after service of process is complete. Miss. Code § 93-15-105(1). Findings of fact are made by a chancery judge sitting without a jury and must be based on clear and convincing evidence showing that one of the grounds exists for termination. Miss. Code § 93-15-109.[11] Chancery courts are courts of

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[10] "Parental rights do not spring full blown from the biological connection between parents and children. They require relationships more enduring." *Caban v. Mohammed*, 441 U.S. 389, 397 (1979) (Stewart, J., dissenting).

[11] The clear and convincing standard of proof is designed to lessen the number of factual errors. As stated in *Santosky v. Kramer*, 455 U.S. 745 (1982): "Unlike a constitutional

record subject to the Mississippi Rules of Civil Procedure and the Rules of Evidence, which are modeled after the Federal Rules of Civil Procedure and Rules of Evidence.

In accordance with these detailed rules and procedures, petitioner, who was represented by counsel, was accorded a full hearing on the merits in front of a judge trained in the law. See discussion *supra* at **§I(A)(1)**.

Petitioner characterizes the trial as hotly contested but then states that the primary error that she intends to urge on appeal is that the chancery judge's decision was unsupported by, and contrary to, the evidence presented. Such assignments of error are rarely successful since they are reviewed under the manifest error/substantial credible evidence test. *See Vance v. Lincoln County DPW*, 582 So.2d 414, 417 (Miss. 1991).

The combination of detailed statutory requirements for termination of parental rights, a high standard of proof, and an elaborate evidentiary hearing with the assistance of counsel resulted in a negligible risk of error in this case. *See Lassiter*, 452 U.S. at 32 (recognizing that termination of parental rights case "presented no specially troublesome points of law, either procedural or substantive.").

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requirement of hearings, see, *e.g.*, *Mathews v. Eldridge*, 424 U.S., at 347, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Santosky*, 455 U.S. at 767.

c. The State has a strong interest in having litigants bear the costs of appeals

The third prong of the *Mathews* test requires an analysis of the function and the burden the additional requirement would put on the State. Since protection and best interest of the child is the focus of the State in termination proceedings and since procedural safeguards minimize the possibility of an erroneous decision by the trial court, the State should not be forced to subsidize the appeal of one litigant, the losing side, in civil cases.

The burdens that petitioner would place upon the State in this case are much greater than those recognized in *Ortwein v. Schwab*, 410 U.S. 656 (1973), in which this Court noted that the purpose of the $25 filing fee helped offset the operating cost of the court system. Here, by contrast, the State would both lose filing fees to help offset the cost of the appellate court system and also be forced to expend potentially large amounts of money to subsidize individuals.[12] A large part of the additional expense associated with an appeal is due to the fact that the court reporter must be paid for the additional work of transcribing and preparing the trial record. Under these circumstances, it is only reasonable that the appealing party, the user of the additional services, should be required to pay for them.

Once the barrier between criminal and civil cases has been torn down it can only be assumed that the State will

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[12] The fact that other States, through legislative enactment, choose to subsidize indigents by providing transcripts in civil actions has no bearing on the issue of constitutional entitlement.

be forced to bear the costs of all appeals of indigents in a wide variety of cases. Litigants will spare no time in contending that their interests are "fundamental." A Pandora's box, with no principled basis for distinction, will be opened. Such appeals would arguably include all domestic relations matters such as divorce, paternity and child custody, as well as other cases where "important" interests are litigated.

The quantity of such subsidized cases would be significant. In 1995, there were 63,765 civil actions filed in the Chancery Courts of the State of Mississippi. Of those, 39,475 were domestic relations cases. This compares to 15,487 criminal dispositions and 22,476 civil filings in the Circuit Courts of the State of Mississippi. *Supreme Court of Mississippi, 1995 Annual Report*, pp. 55, 48. A breakdown of the chancery court statistics reveals that of the 63,765 civil actions filed, 194 involved termination of parental rights, 1027 involved custody or visitation, and 6080 were paternity cases. Of those cases decided on the merits by the Supreme Court of Mississippi in 1995, 194 were first appeals of criminal convictions, 40 involved domestic relations and 10 involved custody. *Id.* at 23. Of those cases disposed of by the Court of Appeals in 1995, 298 were first appeals of criminal convictions, 27 involved domestic relations and 6 involved custody. *Id.* at 42.[13]

The function of the State in a termination of parental rights action is to protect the physical well-being of a

[13] It should be correct to assume that the number of appeals of domestic relations matters will substantially increase once they are available at taxpayer expense. It is also possible that these types of appeals will outnumber criminal appeals.

child, *See In re Gault*, 387 U.S. 1, 16 (1967), and to provide initially an adjudicatory forum for litigants as in other civil actions where important interests are at stake. If criminal procedures are required the character of the proceeding becomes quasi-criminal with the goal being punishment instead of protection. Additionally, the function of the State will be changed because of other cases brought against indigents involving important liberty and property interests. The traditional position of the State, as neutral provider of an adjudicatory forum for disputes between civil litigants, will be transformed. This will be true even if, as in the present case, the State is not a party to the action.[14]

It is simply not reasonable to impose these additional functions and potentially huge additional costs upon the State when, as here, the parent has been accorded a "fundamentally fair" hearing in the trial court. The actions of the State in this case – the provision of a system of civil appeals in which all litigants must pay the costs of appeal – do not directly or substantially interfere with the parent/child relationship and are otherwise reasonably related to a legitimate State interest. *See Lyng v. Castillo*, 477 U.S. 635 (1986) (holding that federal food stamp program amendments narrowing the definition of household did not burden a fundamental right because it did not directly and substantially interfere with family living arrangements); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)

[14] The underlying dispute in this case was between two private litigants. The State did not initiate the termination proceedings, but only provided the adjudicatory forum and the substantive standard to be applied by the chancery judge.

(noting that reasonable regulations of the fundamental right to marry may legitimately be imposed); *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding regulation terminating benefits upon marriage as rationally related to governmental interest); and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (if no strict scrutiny, the legislation will be upheld unless it is "without any reasonable basis and . . . is purely arbitrary.").

II. THE EQUAL PROTECTION CLAUSE IS NOT VIOLATED BY MISSISSIPPI'S FAILURE TO SUBSIDIZE THE COSTS OF AN APPEAL FROM A DECISION OF A LOWER COURT TERMINATING PARENTAL RIGHTS

The cases upon which petitioner relies to overcome the doctrinal weakness of her position fare no better under an equal protection guise than they did under a due process guise. *See supra* **§I**. At worst, the Mississippi statute in question has a greater impact on a non-suspect class, the poor. Under this Court's equal protection precedents, such a statute could not possibly violate the Equal Protection Clause, at least outside the criminal context.

A. The Equal Protection Clause Does Not Proscribe State Statutes – Such As The One At Issue – Which Are Of General Applicability And Purportedly Have A Greater Impact On A Non-Suspect Class

Mississippi requires all civil appellants to pay the costs of appeal. The requirement is not limited to particular types of actions nor to particular types of appellants. Everyone must prepay appeal costs regardless of the

right or claim involved in the appeal. Petitioner has never contended, nor should she, that Mississippi designed the rule for any reason other than the perfectly reasonable one of obtaining the costs of providing a discretionary service. Mississippi's legislature has not been shown to bear any animus against the indigent nor any intent to single them out. This alone resolves the equal protection issue.

In *Washington v. Davis*, 426 U.S. 229, 242 (1976), this Court rejected the argument that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may effect a greater proportion of one race than of another." This must be all the more true with respect to an allegedly disparate impact on a class that, unlike race, is not suspect. This Court has specifically held that the poor are not a suspect class. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) (quoting *Maher v. Roe*, 432 U.S. 464 (1977), which in turn cited *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) and *Dandridge v. Williams*, 397 U.S. 471 (1970)).

The result here should therefore be the same as in *Schweiker v. Wilson*, 450 U.S. 221 (1981), in which this Court rejected the contention of residents of public mental institutions (appellees) that the SSI program violated the equal protection component of the Fifth Amendment's Due Process Clause because it excluded from eligibility anyone who is an "inmate of a public institution." The Court concluded that the appellees' claim suffered from a fatal flaw, fully applicable here – the statute did not discretely classify based upon the alleged class (the mentally ill). Rather, the statute excluded from eligibility a larger group (inmates of public institutions), of which

the mentally ill were a subset. After noting that "appellees failed to produce any evidence that the intent of Congress was to classify on the basis of mental health," the Court held that "the indirect deprivation worked by this legislation upon appellees' class, whether or not the class is considered 'suspect' does not without more move us to regard it with heightened scrutiny." *Id.* at 234.[15] The Court then upheld the statute after concluding that it "advanced legitimate legislative goals in a rational fashion." *Id.* at 234-39. The same result must obtain here.

B. This Court's Decisions in *Griffin* and *Boddie* Do Not Support Petitioner's Equal Protection Claim

The majority opinion in *Griffin v. Illinois*, 351 U.S. 12 (1956), refused to choose between the Equal Protection and Due Process Clauses as the basis for its conclusion that an indigent criminal defendant must be provided with a free transcript when an appeal of right exists. However, the vigorous dissent of Justice Harlan in that and subsequent cases contended that appellate review of criminal convictions were mandated by procedural due process.[16] This interpretation was subsequently accepted as to civil access fees in *Boddie v. Connecticut*, 401 U.S. 371 (1971), when Justice Harlan wrote the majority opinion invalidating the fee requirement on due process grounds.

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[15] The Court therefore did not address whether classifications based upon mental illness warrant heightened scrutiny.

[16] *See, e.g., Douglas v. California*, 372 U.S. 353, 361, 363-64 (1963) (Harlan, J., dissenting); *Griffin v. Illinois*, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting).

The holding in *Boddie* was narrowed by the decision in *United States v. Kras*, 409 U.S. 434 (1973), where this Court refused to apply the monopolization rationale of *Boddie* in the context of bankruptcy filing fees, thus undermining the idea of a fundamental rights equal protection doctrine.[17] *See also Dandridge v. Williams*, 397 U.S. 471 (1970) which applied minimum rationality review to an equal protection challenge to the policy of capping AFDC benefits for large families. The majority opinion rejected heightened scrutiny despite acknowledging that "the most basic economic needs of impoverished human beings" were at issue. *Dandridge*, 397 U.S. at 485. This opinion was reinforced in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), rejecting an equal protection challenge to the state scheme for funding education which created a spending disparity across school districts. The majority rejected the suggestion that education was a fundamental right and declared that a fundamental right would be found for equal protection purposes only if it were explicitly embraced in, or implicitly derived from, the constitutional text. *Rodriguez*, 411 U.S. at 29-30, 33-34.

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[17] *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 286-87 (1991). The author concludes that in cases such as *Dandridge v. Williams*, 397 U.S. 471 (1970) and *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) "the door to the discovery of new fundamental rights was firmly shut."

Griffin and its progeny simply do not support petitioner's claim in this case that her equal protection rights have been violated.[18]

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[18] If a new rule is created in this case, it should have prospective application only based on an analysis of the factors to be considered in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). A new rule requiring the State to subsidize costs of indigents appealing termination of parental rights is plainly an issue of first impression which was not foreshadowed by this Court. In fact, such a rule would appear to contradict the decision by this Court in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Additionally, no child who has been freed for adoption, and certainly no child who has been adopted, should be burdened with the uncertainty and fear associated with an attempt to overturn the termination because the indigent parent was not provided a free transcript for appeal.

CONCLUSION

The order of the Supreme Court of Mississippi dismissing petitioner's appeal for failure to prepay costs should be affirmed.

Respectfully submitted,

MIKE MOORE
Attorney General
State of Mississippi

RICKEY T. MOORE*
Special Assistant
Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

Counsel for Respondents

June 28, 1996

* Counsel of Record

APPENDIX "A"

Section 93-15-103, Mississippi Code Annotated, as amended, addresses termination of parental rights as follows:

> "(3) Grounds for termination of parental rights shall be based on one or more of the following factors:
>
> (a) A parent has deserted without means of identification or abandoned and made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year; or
>
> (b) A parent has been responsible for a series of abusive incidents concerning one or more children; or
>
> (c) When the child has been in the care and custody of a licensed child caring agency for at least one (1) year, that agency has made diligent efforts to develop and implement a plan for return of the child to its parents, and;
>
> (i) The parent has failed to exercise reasonable available visitation with the child; or
>
> (ii) The parent, having agreed to a plan to effect placement of the child with the parent, fails to implement the plan so that the child caring agency is unable to return the child to said parent; or

(d) The parent exhibits ongoing behavior which would make it impossible to return the child to the parent's care and custody:

(i) Because the parent has a diagnosable condition unlikely to change within a reasonable time such as alcohol or drug addiction, severe mental deficiencies or mental illness, or extreme physical incapacities, which condition makes the parent unable to assume minimally, acceptable care of the child; or

(ii) Because the parent fails to eliminate behavior, identified by the child care agency or the court, which prevents placement of said child with the parent in spite of diligent efforts of the child caring agency to assist the parent; or

(e) When there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment; or

(f) When a parent has been convicted of any of the following offenses against his natural or adopted child: (i) rape of a child under the provisions of Section 97-3-65, (ii) sexual battery of a child under the provisions of Section 97-3-95(c). (iii) touching a

child for lustful purposes under the provisions of Section 97-5-23, (iv) exploitation of a child under the provisions of Section 97-5-31, (v) felonious abuse or battery of a child under the provisions of Section 97-5-39(2), or (vi) carnal knowledge of a step or adopted child or a child of a cohabiting partner under the provisions of Section 97-5-41.